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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 PEDRO MORALES,

No. CIV.S-04-1524 DAD

12 Plaintiff,

13 v.

ORDER

14 JO ANNE B. BARNHART,
15 Commissioner of Social
Security,

16 Defendant.
17 _____/

18 This social security action was submitted to the court,
19 without oral argument, for ruling on plaintiff's motion for summary
20 judgment and defendant's cross-motion for summary judgment. For the
21 reasons explained below, the decision of the Commissioner of Social
22 Security ("Commissioner") is affirmed.

23 **PROCEDURAL BACKGROUND**

24 Plaintiff Pedro Morales applied for Disability Insurance
25 Benefits under Title II of the Social Security Act (the "Act").
26 (Transcript (Tr.) at 44-47.) The Commissioner denied plaintiff's

1 application initially and on reconsideration. (Tr. at 27-30, 34-37.)
2 Pursuant to plaintiff's request, a hearing was held before an
3 administrative law judge ("ALJ") on January 6, 2004, at which time
4 plaintiff was represented by counsel. (Tr. at 160-83.) In a
5 decision issued on February 27, 2004, the ALJ determined that
6 plaintiff was not disabled. (Tr. at 13-20.) The ALJ entered the
7 following findings:

- 8 1. The claimant meets the nondisability
9 requirements for a period of disability
10 and Disability Insurance Benefits set
11 forth in Section 216(i) of the Social
Security Act and is insured for
benefits through the date of this
decision.
- 12 2. The claimant has not engaged in
13 substantial gainful activity since the
alleged onset of disability.
- 14 3. The claimant's discogenic low back pain
15 is a "severe" impairment, based upon
16 the requirements in the Regulations (20
CFR § 404.1520(c)).
- 17 4. This medically determinable impairment
18 does not meet or medically equal one of
the listed impairments in Appendix 1,
Subpart P, Regulation No. 4.
- 19 5. The undersigned finds the claimant's
20 allegations regarding his limitations
21 are not totally credible for the
reasons set forth in the body of the
decision.
- 22 6. The claimant has the residual
23 functional capacity to perform light
24 work with a preclusion from frequent
bending.

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1 7. The claimant's past relevant work as
2 fruit sorter did not require the
3 performance of work-related activities
 precluded by his residual functional
 capacity (20 CFR § 404.1565).

4 8. The claimant's medically determinable
5 discogenic low back pain does not
6 prevent the claimant from performing
 his past relevant work.

7 9. The claimant was not under a
8 "disability" as defined in the Social
9 Security Act, at any time through the
 date of the decision (20 CFR §
 404.1520(e)).

10 (Tr. at 20.) The Appeals Council declined review of the ALJ's
11 decision on June 9, 2004. (Tr. at 5-10.) Plaintiff then sought
12 judicial review, pursuant to 42 U.S.C. § 405(g), by filing the
13 complaint in this action on August 3, 2004.

14 **LEGAL STANDARD**

15 The Commissioner's decision that a claimant is not disabled
16 will be upheld if the findings of fact are supported by substantial
17 evidence and the proper legal standards were applied. Schneider v.
18 Comm'r of the Soc. Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000);
19 Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.
20 1999). The findings of the Commissioner as to any fact, if supported
21 by substantial evidence, are conclusive. See Miller v. Heckler, 770
22 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is such relevant
23 evidence as a reasonable mind might accept as adequate to support a
24 conclusion. Morgan, 169 F.3d at 599; Jones v. Heckler, 760 F.2d 993,
25 995 (9th Cir. 1985) (citing Richardson v. Perales, 402 U.S. 389, 401
26 (1971)).

1 A reviewing court must consider the record as a whole,
2 weighing both the evidence that supports and the evidence that
3 detracts from the ALJ's conclusion. See Jones, 760 F.2d at 995. The
4 court may not affirm the ALJ's decision simply by isolating a
5 specific quantum of supporting evidence. Id.; see also Hammock v.
6 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence
7 supports the administrative findings, or if there is conflicting
8 evidence supporting a finding of either disability or nondisability,
9 the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d
10 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an
11 improper legal standard was applied in weighing the evidence, see
12 Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

13 In determining whether or not a claimant is disabled, the
14 ALJ should apply the five-step sequential evaluation process
15 established under Title 20 of the Code of Federal Regulations,
16 Sections 404.1520 and 416.920. See Bowen v. Yuckert, 482 U.S. 137,
17 140-42 (1987). This five-step process can be summarized as follows:

18 Step one: Is the claimant engaging in substantial
19 gainful activity? If so, the claimant is found
not disabled. If not, proceed to step two.

20 Step two: Does the claimant have a "severe"
21 impairment? If so, proceed to step three. If
not, then a finding of not disabled is
22 appropriate.

23 Step three: Does the claimant's impairment or
24 combination of impairments meet or equal an
impairment listed in 20 C.F.R., Pt. 404, Subpt.
25 P, App. 1? If so, the claimant is conclusively
presumed disabled. If not, proceed to step four.

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1 Step four: Is the claimant capable of performing
2 his past work? If so, the claimant is not
disabled. If not, proceed to step five.

3 Step five: Does the claimant have the residual
4 functional capacity to perform any other work?
5 If so, the claimant is not disabled. If not, the
claimant is disabled.

6 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995). The claimant
7 bears the burden of proof in the first four steps of the sequential
8 evaluation process. Yuckert, 482 U.S. at 146 n.5. The Commissioner
9 bears the burden if the sequential evaluation process proceeds to
10 step five. Id.; Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
11 1999).

12 APPLICATION

13 Plaintiff advances essentially three arguments in his
14 motion for summary judgment. First, plaintiff asserts that the ALJ
15 generally improperly evaluated the medical evidence regarding
16 plaintiff's alleged back impairment. Second, plaintiff maintains
17 that the ALJ failed to properly consider whether plaintiff's
18 impairments equal a listed impairment. Third, plaintiff asserts that
19 the ALJ erred in discounting the testimony of plaintiff regarding the
20 severity of plaintiff's symptoms and the resulting limitations those
21 symptoms place upon him. The court addresses plaintiff's arguments
22 below, although not in the order plaintiff has presented them.

23 Beginning with plaintiff's argument that the ALJ improperly
24 evaluated certain evidence regarding plaintiff's back impairment,
25 plaintiff specifically asserts that the ALJ minimized the

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1 significance of the October 8, 2001, MRI of plaintiff's low back
2 which resulted in the following impression:

3 1. Mild L4-L5 disc degeneration with broad
4 central 2-4 mm herniation, resulting in mild
spinal canal stenosis.

5 2. Mild L5-S1 disc degeneration with focal
6 central 3-mm protrusion and fissuring of the
annulus. No stenosis at this level.

7 3. No fracture is identified.

8 (Tr. at 104-06, 157.) Plaintiff's argument is misplaced.

9 The ALJ accurately summarized the results of the MRI in his
10 written decision. (Tr. at 17.) The ALJ also accurately noted that
11 following his review of the MRI results, plaintiff's treating
12 physician simply assessed "[l]umbar spine pain, persistent, status
13 post-MVA 06/11/01." (Tr. at 103.) Following his October 22, 2001,
14 examination of plaintiff, that treating physician, Paul C. Riggle,
15 M.D., noted that while plaintiff continued to complain of low back
16 pain with radiating pain to his left leg, there were no neurologic
17 symptoms or weakness. (Id.) Similarly, plaintiff had some left back
18 pain upon straight leg testing and tenderness over the lumbar spine,
19 but motor and sensory examinations were normal. (Id.) The back also
20 had normal range of motion without tenderness and there was no
21 paraspinous muscle tenderness or spasm. (Id.) Thus, Dr. Riggle
22 simply re-started non-steroidal anti-inflammatory medication;
23 referred plaintiff to physical therapy; and advised that he continue
24 chiropractic care. (Id.) Following four physical therapy sessions,
25 physical therapist Teresa King, P.T. discharged plaintiff on December
26 24, 2001, because plaintiff "[h]as missed several appointments/

1 dropped out." (Tr. at 112.) Ms. King noted that plaintiff "reported
2 feeling much better" at his last visit which was on November 8, 2001.
3 (Id.) In sum, while plaintiff asserts he has a debilitating low back
4 condition, the MRI of his spine and the records of his treating
5 sources do not support that assertion. The ALJ appropriately
6 assessed the medical evidence in this regard.

7 In contesting the ALJ's evaluation of the evidence,
8 plaintiff also asserts that the ALJ improperly utilized the opinion
9 of Holly Kelly, M.D., the consulting physical medicine and
10 rehabilitation specialist who examined plaintiff on May 31, 2003.
11 (Tr. at 130-34.) Specifically, plaintiff argues that since the ALJ
12 chose to rely on the opinion of Dr. Kelly in formulating plaintiff's
13 residual functional capacity, he should have incorporated all of the
14 limitations assessed by Dr. Kelly. However, plaintiff cites no
15 authority in support of this proposition. Indeed, the residual
16 functional capacity determination is the province of the ALJ, not any
17 physician. 20 C.F.R. § 404.1546(c); Vertigan v. Halter, 260 F.3d
18 1044, 1049 (9th Cir. 2001).

19 Moreover, as defendant points out, Dr. Kelly's assessment
20 is consistent with the ALJ's residual functional capacity
21 determination. The court realizes that the ALJ's determination in
22 this regard did not expressly account for Dr. Kelly's finding that
23 plaintiff avoid stooping and crouching and be able to change
24 positions every two hours. (Tr. at 134.) However, as defendant also
25 points out, plaintiff's past relevant position of a fruit sorter does
26 not require stooping, crouching or any other type of bending. See

1 Dictionary of Occupational Titles, U.S. Dept. of Labor (4th ed. 1991)
2 ("DOT"), § 529.687-186.¹ Defendant also persuasively argues that any
3 requirement that plaintiff be afforded an opportunity to change
4 positions every two hours could be accommodated with usual work
5 breaks and a lunch break. Therefore, to the extent that the ALJ
6 erred in not specifically including any stooping, crouching or break
7 limitations in his residual functional capacity assessment, that
8 error was harmless. See Curry v. Sullivan, 925 F.2d 1127, 1131 (9th
9 Cir. 1990); Booz v. Sec'y of Health & Human Servs., 734 F.2d 1378,
10 1380 (9th Cir. 1984).

11 For all of these reasons, the court finds that the ALJ
12 properly evaluated the medical evidence regarding plaintiff's alleged
13 back impairment. Plaintiff's argument to the contrary is rejected.

14 Turning to plaintiff's credibility argument, it is well-
15 established that the determination of credibility is a function of
16 the ALJ, acting on behalf of the Commissioner. See Saelee v. Chater,
17 94 F.3d 520, 522 (9th Cir. 1995). An ALJ's assessment of credibility
18 should, in general, be given great weight. Nyman v. Heckler, 779
19 F.2d 528, 530-31 (9th Cir. 1985). Thus, questions of credibility and
20 resolution of conflicts in the testimony are functions solely of the
21 Commissioner. Morgan, 169 F.3d at 599. In evaluating a claimant's
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23 ¹ The demands of past relevant work can be ascertained by
24 looking to the demands of the occupation as generally required by
25 employers throughout the national economy. Pinto v. Massanari, 249
26 F.3d 840, 845 (9th Cir. 2001). "[T]he best source for how a job is
generally performed is usually the Dictionary of Occupational
Titles." Id. at 845-46 (citing Johnson v. Shalala, 60 F.3d 1428,
1435 (9th Cir. 1995) and 20 C.F.R. §§ 404.1566(d) and 416.966(d)).

1 subjective testimony regarding pain and the severity of his or her
2 symptoms an ALJ may consider the presence or absence of supporting
3 objective medical evidence along with other factors. See Bunnell v.
4 Sullivan, 947 F.2d 341, 346 (9th Cir. 1991); see also Smolen v.
5 Chater, 80 F.3d 1273, 1285 (9th Cir. 1996). Ordinary techniques of
6 credibility evaluation may be employed, and the adjudicator may take
7 into account prior inconsistent statements or a lack of candor by the
8 witness. See Fair v. Bowen, 885 F.2d 597, 604 n.5 (9th Cir. 1989).

9 Nonetheless, an ALJ's rejection of a claimant's testimony
10 must be supported by specific findings. Morgan, 169 F.3d at 599;
11 Matthews v. Shalala, 10 F.3d 678, 679 (9th Cir. 1993) (citing Miller,
12 770 F.2d at 848). Once a claimant has presented evidence of an
13 underlying impairment, the ALJ may not discredit the claimant's
14 testimony as to the severity of his or her symptoms merely because
15 the testimony is unsupported by objective medical evidence. Reddick
16 v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); Light v. Chater, 119
17 F.3d 789, 792 (9th Cir. 1997). Rather, "the ALJ can reject the
18 claimant's testimony about the severity of [his or] her symptoms only
19 by offering specific, clear and convincing reasons for doing so."
20 Light, 119 F.3d at 792. See also Reddick, 157 F.3d at 722.

21 Here, plaintiff's medical records document a condition
22 which might reasonably be expected to cause the symptoms alleged by
23 plaintiff. However, while plaintiff alleges that he is totally
24 unable to work due to the severity of his symptoms stemming from his
25 back condition, the ALJ made specific and detailed findings in not
26 fully crediting plaintiff's testimony in this regard. For example,

1 the ALJ accurately observed that plaintiff did not follow through
2 with his physical therapy as scheduled. (Tr. at 112.) The Ninth
3 Circuit has explained that a claimant's failure to follow a
4 prescribed course of treatment without adequate explanation may cast
5 doubt on the sincerity of the claimant's testimony. See Smolen, 80
6 F.3d at 1284; Bunnell, 947 F.2d at 346; Fair, 885 F.2d at 603.

7 The ALJ also found plaintiff less than credible due to the
8 findings of Dr. Kelly and the two non-examining state agency
9 physicians who found plaintiff capable of performing work. (Tr. at
10 130-34, 140, 141-48.)

11 Substantial evidence in the form of records from
12 plaintiff's treating physician and his physical therapist also
13 supports the ALJ's observation that plaintiff underwent generally
14 conservative treatment -- including medications, chiropractic care
15 and physical therapy (Tr. at 102-21) -- which also justifies
16 discounting plaintiff's complaints of totally disabling pain. See
17 Johnson, 60 F.3d at 1434 (considering claimant's conservative
18 treatment as inconsistent with the debilitating condition claimed in
19 upholding denial of benefits); Fair, 885 F.2d at 604 (same).

20 Finally, it is worth noting that the ALJ did not totally
21 reject plaintiff's subjective complaints of pain. In this regard,
22 the ALJ limited plaintiff to light work and thus obviously credited
23 those complaints of pain to some extent.

24 For these reasons the court finds that the ALJ fairly
25 characterized the record and sufficiently stated specific, clear and
26 convincing reasons for not fully crediting plaintiff's testimony

1 regarding the severity of his symptoms. See Tidwell v. Apfel, 161
 2 F.3d 599, 602 (9th Cir. 1998). Plaintiff's argument to the contrary
 3 must be rejected.²

4 With respect to plaintiff's argument regarding step three
 5 of the sequential evaluation, plaintiff's specific assertion is that
 6 the ALJ's written decision "failed to contain any discussion
 7 regarding the requirements of [20 C.F.R. Pt. 404, Subpt. P, App. 1, §
 8 1.04 ("Listing 1.04")]", which concerns "Disorders of the spine."³
 9 (Pl.'s Mem. of P. & A. at 10.) In a sentence plaintiff further
 10 offers that "the combined effect of plaintiff's non-exertional
 11 impairments of chronic pain syndrome, headaches, tinnitus and
 12 obesity" amount to a "possible medical equivalency to the Listing."
 13 (Id.) (emphasis added.) The court recognizes that the ALJ did not

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 15 ² In his motion plaintiff also briefly contests the ALJ's
 16 treatment of the testimony of plaintiff's wife at the administrative
 17 hearing. (Tr. at 177-82) Mrs. Morales essentially supported her
 18 husband's testimony regarding the extent of his limitations.
 19 However, in accurately assessing the medical evidence as a whole as
 20 well as noting plaintiff's conservative care and failure to follow
 21 prescribed treatment, the court finds that the ALJ also provided
 specific reasons for expressly disregarding the testimony of
 plaintiff's wife, although those reasons are not expressly delineated
 as such in the ALJ's written decision. See Lewis v. Apfel, 236 F.3d
 503, 511 (9th Cir. 2001) ("In all, the ALJ at least noted arguably
 germane reasons for dismissing the family members' testimony, even if
 he did not clearly link his determination to those reasons.").

22 ³ Listing 1.04, the substance of which used to be set forth at
 23 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.05C ("Listing 1.05C"), was
 24 in effect at the time the ALJ rendered his February 27, 2004,
 25 decision and is the relevant Listing here. While plaintiff also
 26 cites to Listing 1.05C in his motion, the court assumes that the
 citation is inadvertent. Listing 1.05C now concerns amputations and
 obviously does not apply. See Angel v. Barnhart, 329 F.3d 1208, 1210
 n.5 (10th Cir. 2003) ("Listing 1.05C was revised in 2002, and it is
 now listing 1.04. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04
 (2002).")

1 discuss the combined effects of all of those alleged impairments or
2 compare them to any Listing. However, plaintiff has not offered any
3 theory as to how his impairments combine to equal a listed impairment
4 nor has he pointed to evidence in support of any such theory.
5 Therefore, his argument that the ALJ erred by failing to consider the
6 combined effects of his impairments is rejected. See Lewis, 236 F.3d
7 at 514 ("The ALJ did not discuss the combined effects of Lewis's
8 impairments, or compare them to any listing.... [H]owever, Lewis has
9 offered no theory, plausible or otherwise, as to how his seizure
10 disorder and mental retardation combined to equal a listed
11 impairment."); see also Burch v. Barnhart, 400 F.3d 676, 682-83 (9th
12 Cir. 2005) (claimant did not carry his initial burden of proving that
13 she had a combination of impairments that meet or equal the criteria
14 of a listed impairment).

15 **CONCLUSION**

16 Accordingly, IT IS HEREBY ORDERED that:

- 17 1. Plaintiff's motion for summary judgment is denied;
18 2. Defendant's cross-motion for summary judgment is
19 granted; and
20 3. The decision of the Commissioner of Social Security is
21 affirmed.

22 DATED: September 12, 2005.

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24 _____
25 DALE A. DRCZD
26 UNITED STATES MAGISTRATE JUDGE

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